

JAN 28 1983

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CLERK

**No. 82-1120**

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1982

**MARY LOU TORAASON,**

*Petitioner,*

vs.

**LAURA L. BURKART,**

*Respondent.*

**On Petition For A Writ Of Certiorari To The  
Appellate Court Of Illinois, Third Judicial District**

**RESPONDENT'S BRIEF IN OPPOSITION**

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## QUESTION PRESENTED FOR REVIEW

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Whether the decision of the Illinois Appellate Court, Third District, affirming a \$350,000 judgment on the verdict below constitutes a denial of due process of law or equal protection of the law under the Fourteenth Amendment to the United States Constitution when the Illinois Supreme Court, subsequent to its denial of a petition for leave to appeal from such decision of the Illinois Appellate Court, Third District, refused to allow the filing of petitioner's petition for rehearing of the petition for leave to appeal.

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**OPINIONS BELOW**

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The opinion of the Appellate Court of Illinois, Third District, Docket No. 81-600, decided on April 29, 1982, was not published. The citation and date of decision set forth in petitioner's Petition for Writ of Certiorari are, therefore, erroneous. The opinion set forth in the appendix to the Petition, however, is an accurate copy of the opinion on which the Petition herein is predicated.

## STATEMENT OF THE CASE

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Respondent, Laura L. Burkart, brought suit against the petitioner, Mary Lou Toraason, for medical malpractice arising out of injuries sustained by the respondent as the result of medical care rendered by the petitioner at and after the birth of respondent's second child in 1976. A jury verdict was rendered in favor of the respondent in the amount of \$350,000 and a judgment was entered thereon on July 10, 1981.

Undisputed evidence at the trial indicated that the respondent first became aware of the possible negligence of the petitioner in the causation of her injuries in December, 1978, and that the respondent filed a lawsuit herein on November 9, 1979.

The Appellate Court of Illinois, Third District, affirmed the judgment of the trial court on April 29, 1982.

Petitioner thereafter filed a petition for leave to appeal to the Illinois Supreme Court and that petition was denied on October 5, 1982. Petitioner then filed a petition for rehearing of the petition for leave to appeal on the basis of the decision of *Sharpe v. Jackson Park Hospital*, 92 Ill.2d 232, 441 N.E.2d 645 (1982). The *Sharpe* case, however, was decided on September 17, 1982, eighteen days prior to the date of the denial of the petition for leave to appeal herein.

On October 25, 1982, the petition for rehearing was returned unfiled to petitioner's counsel for the reason that such petitions for rehearing are expressly prohibited by the order of the Illinois Supreme Court of November 15, 1979.

## SUMMARY OF ARGUMENT

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The Illinois Supreme Court ruled in *Witherell v. Weimer*, 85 Ill.2d 146, 421 N.E.2d 869 (1981), that the Illinois Revised Statutes Chapter 83, Section 22.1 pertaining to the Illinois medical negligence statute of limitations must be construed to commence upon the concurrence of the actual or constructive knowledge of both a party's physical problem and the possibility of its wrongful causation.

*Sharpe v. Jackson Park Hospital*, 92 Ill.2d 232, 441 N.E.2d 645 (1982), does not in any manner overrule the *Witherell* holding; but, rather, further delineates the statute of limitations in medical negligence cases from the statute of limitations pertaining to personal injury claims in general. *Witherell* is cited favorably in the *Sharpe* opinion and, consequently, *Sharpe* must be construed within the context of *Witherell*.

Petitioner bases her petition for writ of certiorari on a mistaken interpretation of *Sharpe* and further on the unsubstantiated premise that the *Sharpe* decision was not considered by the Illinois Supreme Court in its denial of her petition for leave to appeal in spite of the fact that the *Sharpe* opinion was rendered prior to the denial and the Illinois Supreme Court had adequate opportunity to consider its holding in *Sharpe* in reaching its decision herein.

The United States Supreme Court has held in numerous cases that the construction of a state statute by a state's highest court is binding on it (citations omitted).

Consequently, there was no violation of due process or equal protection in disallowing a petition for rehearing on a matter upon which the Illinois Supreme Court has had a prior opportunity to consider and reject precedent subsequently offered by the petitioner.

## REASONS FOR DENIAL OF WRIT OF CERTIORARI

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THE OPINION OF THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT, AND THE SUBSEQUENT ACTION OF THE ILLINOIS SUPREME COURT IN ITS REFUSAL TO PERMIT FILING OF A PETITION FOR REHEARING OF PETITIONER'S PETITION FOR LEAVE TO APPEAL COMPORTS WITH THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

The argument advanced by petitioner for the granting of a writ of certiorari herein is based solely on the premise that the case of *Sharps v. Jackson Park Hospital*, 92 Ill.2d 232, 441 N.E.2d 645 (1982), abrogates prior decisions of the Appellate Courts of Illinois as adopted by the Illinois Supreme Court regarding the judicial construction of the statute of limitations in Illinois applicable to medical malpractice actions. A review of these prior decisions, which petitioner has ignored, is essential for a precise interpretation of this statute.

In recent years, the Courts of Illinois have consistently construed Illinois Revised Statutes Chapter 83, Section 22.1 pertaining to the statute of limitations relative to medical negligence actions as providing that the statute begins to run when there is a concurrence of the actual or constructive knowledge of *both* a party's physical problem and the possibility of its wrongful causation. *Roper v. Markle*, 59 Ill.App.3d 706, 375 N.E.2d 934 (1978); *Kristina v. St. James Hospital*, 63 Ill.App.3d 810, 380 N.E.2d 816 (1978).

The above decisions expanded the ruling of the Illinois Supreme Court in *Lipsey v. Michael Reese Hospital*,



46 Ill.2d 32, 262 N.E.2d 450 (1970), wherein the Court held that, in medical malpractice cases, a cause of action accrues when the injured person learns of his injury or should reasonably have learned of it.

This expanded interpretation of *Lipsey* was eventually adopted by the Illinois Supreme Court in the case of *Witherell v. Weimer*, 85 Ill.2d 146, 421 N.E.2d 869 (1981), and this twofold precondition to the commencement of the medical malpractice statute of limitations remains the controlling precedent in Illinois today.

The *Sharpe* decision makes no modification in the law as espoused by the *Witherell* Court. It is, in fact, consonant with the *Witherell* decision in holding that the medical malpractice statute of limitations begins to run from the date of the knowledge of the injury (i.e., knowledge as defined in *Witherell*), rather than from the date of the act of malpractice even under circumstances when a plaintiff obtains knowledge of the injury shortly after the date of the act of malpractice and within the "traditional" two year statute of limitation in Illinois for bringing personal injury actions other than those actions involving medical malpractice. *Sharpe* neither overtly nor impliedly overruled the *Witherell* decision. Rather, *Witherell* is cited by the *Sharpe* Court as authority for its decision therein. Consequently, the language of the *Sharpe* opinion relative to the commencement of the Illinois medical malpractice statute of limitations must necessarily be construed within the context of *Witherell*.

The fact question of whether respondent's cause of action was commenced within the applicable limitations period subsequent to the concurrence of the knowledge of her physical problem and its wrongful causation was resolved in her favor by the trial court, affirmed by the Appellate Court of Illinois, Third District, and, by

implication, the Illinois Supreme Court, and that question is not an issue before this Court on review.

It is significant to note that *Sharpe* was decided on September 17, 1982, and *prior* to the denial by the Illinois Supreme Court of petitioner's petition for leave to appeal on October 5, 1982, rather than after the denial as is erroneously set forth in the heading of petitioner's argument herein. Thus, the inescapable conclusion to be reached is that the Illinois Supreme Court reviewed respondent's petition for leave to appeal in light of the *Sharpe* decision and determined the holding therein to be inapplicable to the case before this Court.

The cases are legion that the construction of a state statute by a state's highest court is binding on the United States Supreme Court, *Eisenstadt v. Baird*, 405 U.S. 438, 31 L.Ed.2d 349, 92 S.Ct. 1029 (1972), *Groppi v. Wisconsin*, 400 U.S. 505, 27 L.Ed.2d 571, 91 S.Ct. 490 (1971), *National Association for Advancement of Colored People v. Button*, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963), *Kingsley International Pictures Corp. v. Regents of University of New York State*, 360 U.S. 684, 3 L.Ed.2d 1512, 79 S.Ct. 1362 (1959), *Speiser v. Randall*, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958), *Albertson v. Millard*, 345 U.S. 242, 97 L.Ed. 983, 73 S.Ct. 600 (1953). This rule of law specifically encompasses the construction of a state's statutes of limitations, *Dibble v. Bellingham Bay Land Co.*, 163 U.S. 63, 41 L.Ed. 72, 16 S.Ct. 939 (1896).

Respondent asserts that the petitioner has already been afforded judicial review of the proceedings of this case by both the Appellate and Supreme Courts of Illinois with full consideration of all pertinent case precedent controlling the decision of those Courts herein. It is, therefore, submitted that petitioner's constitutional rights have not been violated. In essence, petitioner is

suggesting that the Illinois Supreme Court should have granted her favored status over other litigants in Illinois by allowing her a second judicial review of these proceedings. Due process and equal protection under the law do not require a rehearing to be granted with regard to a denial of a petition for leave to appeal, especially under circumstances where the Illinois Supreme Court had the opportunity to review and reject the decision relied upon by the petitioner as controlling in this case.

## CONCLUSION

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For the reasons hereinabove stated, respondent, Laura L. Burkart, respectfully prays that this Court deny the petition for writ of certiorari herein.

Respectfully submitted,

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